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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-6320

JOHN J. FELLERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 285 F.3d 721.[1]

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2002. A petition for rehearing was denied on May 7, 2002. Pet.

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the opinion of the court of appeals as Pet. App. A1-A4, the court of appeals' denial of the petition for rehearing as Pet. App. B1, and the district court's order on the motion to suppress as Pet. App. C1-C7.

App. B1. The petition for a writ of certiorari was filed on July 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. 846. The district court sentenced petitioner to 151 months' imprisonment, to be followed by a four-year term of supervised release. Gov't C.A. Br. 5-6. The court of appeals affirmed. Pet. App. A1-A4.

1. On February 23, 2000, a federal grand jury returned a one-count indictment charging petitioner with conspiring to distribute methamphetamine and to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. 846. Gov't C.A. Br. 1. Two police officers went to petitioner's home the next day to arrest him on that charge. Pet. App. A2. When the police arrived at petitioner's home, an officer told him that they were there to discuss petitioner's involvement in the distribution of methamphetamine, that a grand jury had indicted petitioner for conspiring to distribute methamphetamine, and that they had a federal arrest warrant. Pet. App. C3; 4/20/2000 Tr. 9, 57. The officer further explained to petitioner that the indictment

concerned petitioner's involvement with persons such as Kathi Kunning, Pat Sardeson, Thomas Geffs, and Mark Farfalla. Pet. App. C3; 4/20/2000 Tr. 9-10, 57. At that point, petitioner began offering information about "personal problems" that he had when he was associated with those persons and using methamphetamine. 4/20/2000 Tr. 10-13, 69; Pet. App. C3. While petitioner mentioned his use of methamphetamine, he did not discuss his alleged involvement in the distribution of methamphetamine, and the officers directed no questions to him. Pet. App. 4/20/2000 Tr. 43, 58; Pet. App. C3. After about fifteen minutes in petitioner's home, the officers transported petitioner to the county jail. Pet. App. C3.

At the jail, the officers advised petitioner of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), including his right to consult with a lawyer. Petitioner orally waived his Miranda rights and he signed a written waiver of rights form. 4/20/2001 Tr. 16-21. He thereafter gave a statement concerning his acquisition, use, and distribution of methamphetamine. Id. at 21-32.

2. Before trial, petitioner moved to suppress both the statement he made at his home and his subsequent statement at the jail. Pet. App. A2. A magistrate judge recommended that the statement petitioner made at his home be suppressed because he had not been advised of his Miranda rights before making that

statement. Pet. App. C2. The magistrate judge further recommended that portions of petitioner's subsequent jailhouse statement that involved the individuals identified by the officers at petitioner's home should also be suppressed as the fruit of the prior failure to provide Miranda warnings. 4/20/2000 Tr. 102-107; see Pet. App. C2.

The district court granted the suppression motion as to the statement that petitioner made at his home in the absence of Miranda warnings. Pet. App. C2, C7. The district court noted that petitioner was in custody at the time of the statement at his home and that the statement was made in response to remarks of the officers which were "implicitly questions." Pet. App. C1, C6.

The district court, however, ruled that petitioner's subsequent statement made at the jail should not be suppressed. The district court reasoned that because petitioner voluntarily made the jailhouse statements following waiver of his Miranda rights, those statements were admissible under Oregon v. Elstad, 470 U.S. 298 (1985). Pet. App. C4-C7.

3. Following a jury trial at which statements from petitioner's jailhouse interview were admitted into evidence, petitioner was convicted of conspiring to distribute methamphetamine in violation of 21 U.S.C. 846. The court of appeals affirmed. Pet. App. A1-A4.

The court of appeals rejected petitioner's argument that the statement made at the jail was tainted by improperly elicited statements made at his home before his waiver of his Miranda rights. Pet. App. A3. The court of appeals found that the jailhouse statements were admissible under the rule of Oregon v. Elstad, which held that "[t]hough Miranda requires that [an] unwarned admission must be suppressed, the admissibility of any subsequent statement should turn * * * solely on whether it is knowingly and voluntarily made." Pet. App. A3 (quoting Elstad, 470 U.S. at 309). The court of appeals found that the record here amply supported the district court's finding that petitioner's jailhouse statements were voluntary and thus admissible. Ibid.

The court of appeals also noted petitioner's argument that under Patterson v. Illinois, 487 U.S. 285 (1988), "the officers' failure to administer the Miranda warnings at his home violated his Sixth Amendment right to counsel inasmuch as the encounter constituted a post-indictment interview." Pet. App. A3. The court of appeals found Patterson "inapplicable here," because "the officers did not interrogate [petitioner] at his home." Ibid.

In a concurring opinion, Judge Riley expressed his view that, during the arrest at petitioner's home, the police officers did violate petitioner's Sixth Amendment right to counsel by

deliberately eliciting incriminating information after the indictment had been returned. Pet. App. A4. He stated, however, that the constitutional violation with respect to petitioner's initial statement did not require suppression of petitioner's subsequent jailhouse statement. Under the rationale of Elstad, Judge Riley reasoned, the jailhouse statement was admissible in light of petitioner's knowing and voluntary waiver of his right to counsel during the questioning at the jail. Ibid.

ARGUMENT

Petitioner contends that his jailhouse statement should have been suppressed as the fruit of the statement he had made at his home without the benefit of the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). The decision below rejecting that claim does not conflict with any decision of this Court or any court of appeals.[2]

1. It is well-established that, once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in

[2] There is no basis for petitioner's apparent claim (Pet. 23) that his entire jailhouse statement should be suppressed as the fruit of the statement made at his home. Even the magistrate judge, who agreed with petitioner's claim that the second statement was tainted by the initial Miranda violation, recommended suppression of only those parts of petitioner's jailhouse statement that involved specific individuals identified by the officers at petitioner's home. 4/20/2000 Tr. 105-107. Petitioner made no showing that his entire second statement, which broadly covered areas severable from his brief remarks at his home, could possible be viewed as the product of his initial statement.

the prosecution's case-in-chief statements "deliberately elicited" from a defendant without an express waiver of the right to counsel. Massiah v. United States, 377 U.S. 201, 205 (1964). It is equally well-established that the Fifth Amendment requires that Miranda warnings must be given before a suspect's statements made during "custodial interrogation" can be admitted in the prosecution's case-in-chief. Dickerson v. United States, 530 U.S. 428, 431 (2000).

Petitioner argues (Pet. 9-16) that this Court's review is warranted because the court of appeals, in determining whether the officers' conduct at his home violated the Sixth Amendment, improperly considered whether petitioner was "interrogate[d]" by police. Pet. App. 3. Petitioner relies (Pet. 12-13) on this Court's statement in Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980), that [t]he definitions of 'interrogation' under the Fifth and Sixth Amendment, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." Petitioner also relies (Pet. 14) on this Court's statement in United States v. Henry, 447 U.S. 264, 271 (1980), that "affirmative interrogation" is not required for police conduct to constitute deliberate elicitation of incriminating information in violation of the

Sixth Amendment. Petitioner's contention does not warrant this Court's review.

In Innis, the Court held that "the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent," and the "functional equivalent" of interrogation in turn consists of "words or actions on the part of police * * * that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). In this case, petitioner was in police custody following his arrest, and thus the relevant question under the Fifth Amendment was, not only whether the police affirmatively questioned petitioner, but also whether the officer should have known that his statements or conduct were likely to elicit an incriminating response. In those circumstances, there is no meaningful distinction between that Fifth Amendment standard and the Sixth Amendment standard that asks whether the officer deliberately intended to elicit incriminating information from petitioner. Indeed, in Patterson v. Illinois - the decision that the court of appeals discussed in rejecting petitioner's claimed violation of the Sixth Amendment right to counsel - the Court addressed a Sixth Amendment violation by referring to the post-

indictment "interrogation" of the defendant in that case. Patterson v. Illinois, 487 U.S. at 285.[3]

Nothing in the court of appeals' decision purports to weaken or alter the standard used to determine whether police engage in conduct that transgresses the Sixth Amendment. The decision below does not suggest that police must engage in explicit questioning of a suspect before a Sixth Amendment violation can be established, and other decisions of the Eighth Circuit have expressly endorsed and applied the "deliberately elicited" standard to Sixth Amendment claims. See, e.g., Manning v. Bowersox, 310 F.3d 571, 575 (8th Cir. 2002) ("the government may not, either directly or through its agents, deliberately elicit incriminating information from suspects without counsel present"); United States v. Red Bird, 287 F.3d 709, 713 (2002)

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[3] As the Court noted in Innis, 446 U.S. at 300 n.4, the Fifth and Sixth Amendments do impose different obligations on police in their dealings with suspects. The Sixth Amendment, which attaches upon the initiation of formal proceedings against a suspect, applies whether or not the suspect is in custody, ibid, and applies even where the person who elicits the incriminating office is a not police officer. E.g., Henry, supra (government agent who shared cell-block with defendant); Massiah, supra (co-defendant acting as a government agent). In contrast, the Fifth Amendment under Miranda may be implicated only when the police question a suspect who is in custody, and even then, only when the suspect is aware that he is speaking to law enforcement. Illinois v. Perkins, 496 U.S. 292, 297 (1990) ("Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."). But nothing in those cases draws a line between Fifth and Sixth Amendment standards on whether the police interaction with the suspect held in custody constitutes "interrogation" versus "deliberate elicitation."

("Any statement about the charged crime that government agents deliberately elicit from a defendant without counsel present after the defendant has been indicted must be suppressed under the Sixth Amendment exclusionary rule."). All the court did was use the shorthand of "interroga[tion]" to denote that no Sixth Amendment violation occurred - shorthand used in Patterson itself. The court of appeals' fact-based determination in that respect does not warrant further review by this Court.

2. Petitioner also argues (Pet. 17-23) that this Court's review is necessary to determine whether his jailhouse statements, which were preceded by a voluntary waiver of the right to counsel, should nonetheless be suppressed as a fruit of an unlawful Sixth Amendment violation. This case is not an appropriate vehicle in which to address that question. The concurring opinion by Judge Riley expresses the view that, under the Court's reasoning in Elstad, petitioner's jailhouse statements, which were preceded by a waiver of petitioner's right to counsel, were admissible notwithstanding Judge Riley's conclusion that the officer's earlier questioning of petitioner at his home violated his Sixth Amendment right to counsel. Pet. App. A4. The court of appeals, however, did not explicitly address the implications of Elstad for Sixth Amendment claims, and it had no occasion to do so, because it held that the officer's questioning at petitioner's home did not violate the

Sixth Amendment. See Pet. 17 ("[S]ince the Eighth Circuit found no Sixth Amendment Massiah violation, they never determined whether the second statements should have been excluded as fruits of the illegal post-indictment interview.").[4] Moreover, petitioner does not contend that any other court of appeals has addressed the issue. Particularly since the court of appeals did not squarely address the issue, this Court should decline to do so in the first instance.[5]

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[4] Although the court of appeals did hold that petitioner's jailhouse statements were admissible under Elstad (Pet. App. A3), the court of appeals presumably was rejecting a claim under the Fifth Amendment, since it had found no Sixth Amendment violation.

[5] Contrary to petitioner's suggestion, this Court's decisions have not resolved the issue of whether the ruling in Elstad may apply when a suspect makes incriminating statements after knowingly and voluntarily waiving his right to counsel, notwithstanding earlier police questioning that violated the Sixth Amendment because the defendant at that time had not waived his right to counsel. The only Sixth Amendment decision cited by petitioner, Nix v. Williams, 467 U.S. 431 (1984), did not squarely address the issue, but held that physical evidence that is the product of a Sixth Amendment violation need not be suppressed if the police would have inevitably discovered the evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2002